NO. 2842 5

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,

vs.

HARRY CANNON and WALTER D. STOREY,
Appellees.

APPELLANT'S BRIEF.

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BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the decree entered by the district court of the United States for the district of Montana on the 26th day of January, 1916, in favor of appellees and against the appellant and dismissing the bill of complaint. (Tr. pp. 27-28).

The suit in which said decree was entered was brought by appellant for the purpose of having

cancelled and set aside on the ground of fraud a patent for lands theretofore issued to Harry Cannon, one of the defendants named therein, the bill of complaint (Tr. pp. 2-18) having been filed on April 16, 1915. It is alleged in the bill of complaint that appellant was on and prior to May 1, 1909, the owner in fee of certain public lands in the county of Stillwater, in the Billings land district, in the state of Montana (Tr. pp. 2-3); that appellee, Cannon, on May 1, 1909, entered said land as a homestead by making and filing in the United States land office at Billings, Montana, his written application and affidavit to enter said lands, in which application and affidavit Cannon stated that his application to enter said lands as a homestead was made honestly and in good faith for the actual settlement upon and cultivation of said lands, and that he did not enter said lands for speculation but in good faith to obtain a home for himself; that said Cannon paid the legal fees to the Registrar and Receiver of the United States land office at Billings and the Register and Receiver, relying upon and believing said statements of Cannon to be true, accepted and filed said application, allowing said entry (Tr. pp. 2-5); all of which is admitted by the answer of defendants (Tr. p. 21); that the said application and affidavit of said Cannon was false and the application to enter was not made in good faith for the purpose of actual settlement and residence upon and cultivation of said lands by said Cannon and that Cannon did not intend to comply with the homestead laws of the

United States, and that said entry was made with intent to fraudulently acquire title to said lands without either settlement or residence upon or cultivating thereof by Cannon, and the statements contained in the application were made for the purpose of deceiving the officers of the United States, and did deceive them (Tr. pp. 5-6); this is denied by defendants' answer (Tr. p. 21); that Cannon availing himself of the provisions of Section 2301 of the Revised Statutes of the United States and the Acts of Congress amendatory thereof, on January 24, 1911, submitted final proof to the officers of the United States land office at Billings by himself and two witnesses, showing that he, Cannon, had actually established residence upon said lands during the month of May, 1909, and had resided thereon continuously and had never been absent therefrom after May, 1909, except for a period of two weeks in December, 1909, and had cultivated twelve acres thereof and placed improvements thereon consisting of a log house, barn, canals, and fencing (Tr. pp. 6-9); that the officers of said Billings land office accepted said proof and relying upon it and believing it to be true, accepted payment for said lands and issued a final certificate therefor, and thereafter on June 26, 1911, the United States issued its patent for said lands to Cannon; that the acceptance of said proof and all acts on the part of officers of the United States in and about the said entry and issuance of said patent were based upon said proof in the belief that the same was true and in reliance

upon the good faith and truthfulness of said Cannon and his final proof witnesses (Tr. pp. 6-11); all of this is admitted by the answer of defendants (Tr. p. 21); it is further alleged in the complaint that the final proof submitted by Cannon was false, fraudulent and untrue and known by Cannon and his witnesses to be such and was made with intent to deceive and did deceive the officers of the United States, and to fraudulently procure the issuance of said patent to said lands and the purpose for which same was made was accomplished (Tr. pp. 11-14); this is denied by the answer (Tr. p. 22); it is also alleged the appellee Storey purchased said lands from Cannon and received a deed therefor on August 5, 1912, with full knowledge of the fraud practiced by Cannon in securing patent thereto and that said deed is a cloud upon appellant's title and that Storey is not an innocent purchaser in good faith for a valuable consideration (Tr. pp. 14-15); this is denied by defendants' answer and defendants allege Storey to be an innocent purchaser in good faith and that he paid Cannon a valuable consideration of $1,000 for it (Tr. p. 23).

The cause was tried to the court on the complaint and answer on the 24th day of December, 1915, and testimony on behalf of plaintiff and defendant was introduced and after argument of counsel the cause was by the court taken under advisement and thereafter on January 22nd, 1916, the court rendered its decision herein in favor of appellees (Tr. pp. 28-29), and upon such decision a decree was

duly entered herein on January 26, 1916 (Tr. pp. 26-27) in favor of appellees and against appellant dismissing said bill of complaint.

Thereafter, to-wit, on June 16, 1916, appellant filed in the district court of the United States for the district of Montana its petition for an order allowing an appeal from said decree, and said district court granted said petition and allowed this appeal (Tr. pp. 98-99); that on said 16th day of June, 1916, the said petition for an appeal was filed and granted as aforesaid, appellant purchased and filed in said district court its assignments of error herein (Tr. pp. 100-101):

ASSIGNMENTS OF ERROR.

1. The court erred in finding the evidence taken in said cause, on the trial thereof, was insufficient to sustain the allegations of the bill of complaint herein.

2. The court erred in finding the evidence taken in said cause, on the trial thereof, was sufficient to and did sustain allegations of new matter in defense set forth in the answer herein.

3. The court erred in ordering a decree herein in favor of the defendants and against the complainant.

4. The court erred in entering a decree herein in favor of the defendants and against the complaint.

ARGUMENT.

As the appellant contends that the evidence introduced on the trial of said cause was sufficient to sustain the allegations of its bill of complaint and insufficient to sustain the allegations of new matter in defense set forth in the answer herein, we shall take up and consider the first and second specifications of errors assigned that "the court erred in finding that the evidence taken in said cause at the trial thereof was insufficient to sustain the allegations of the bill of complaint therein," and the evidence was sufficient to sustain the allegations of new matter in defense set forth in the answer, herein, jointly, it naturally following that if the court did so err, then error was also committed by the court in ordering and entering the decree dismissing appellant's bill of complaint as specified in the third and fourth assignment of errors.

Before the court evidence was introduced on behalf of the appellant for the purpose of proving the allegations of its bill of complaint to the effect:

First: That the entry of said land, the final proof thereof and the title acquired thereto by the defendant, Harry Cannon, were for the purpose of perpetrating a fraud upon the appellant and fraudulently acquiring title to said land for the benefit of the appellee, Harry Cannon, without any intent on the part of Cannon to comply with the land laws of the United States, no compliance with such laws ever being had on the part of Cannon.

Second: That the appellee, Walter D. Storey, knew of the fraud perpetrated upon the appellant by the defendant, Harry Cannon, in connection with the acquiring of the title to said lands by the defendant, Harry Cannon, and was not an innocent purchaser thereof in good faith for a valuable consideration.

We deeply appreciate that in cases of this kind where there is sufficient evidence to sustain the findings of the trial court, such findings will not be disturbed on appeal unless there is a lack of proof to sustain the findings or the proof is such that it greatly preponderates against the findings made. In this case, we contend that the evidence introduced on behalf of appellant is such that it meets the requirements of the rule laid down by the Supreme Court of the United States in Maxwell Land Grant case, 121 U. S. 325, to the effect that the evidence in a case to cancel a patent to land must be clear and convincing. If courts are to grasp at the flimsy stock defenses that unscrupulous land-grabbers seem always to have on hand and are so prone to unblushingly present to courts, as has been done in the case at bar, then in-deed are the great natural resources of this nation to be bid a fond farewell for it will surely foster a contempt for the law and observance of the few simple requirements laid down by Congress whereby our citizens are given a share of this nation's public domain. Congress in its wisdom has outlined a course of action on the part of its citizens which it says should be followed

in order to obtain patents for land, but the laws that state what an entryman shall do seem to be more honored in their breach than observance. The iniquituous practices of large land-holders have become so obnoxious that for some years past we have seen grown up a bureau of investigation, the sole duty of which is to see that the donor of our virgin soil is not defrauded but also to struggle vainly against the multitude of schemes and devices continuously invented and used to dodge the few plain and simple requirements of law. The practices so frequent during the past half century or more in those regions where public land was abundant, throughout this country, by which this nation has been induced to part with a major portion of its public lands, were generally considered quite proper by those who came in contact with questionable practices, but in this day there is no longer the general indifference as to what is being done in land matters. Hence we urge that the evidence in this case as outlined here by us and fully shown by the transcript is of the character and kind which does not sustain the findings of the trial court, but which, on the other hand, requires the granting of the relief prayed for in the complaint.

We contend the evidence shows that Cannon never intended to comply with the homestead laws when he filed on the land in question, and furthermore he falsely and fraudulently swore to and submitted a final proof corroborated by two witnesses, which he and his witnesses knew to be false and

fraudulent, and which imposed upon and deceived the officers of the United States having to do with the passing upon the sufficiency of such proof and issuance of patents, and because of such deception practiced by Cannon, the patent was unlawfully obtained.

Considering the testimony in the order of events connected with the fraud we find:

The records of the Billings land office show that the land in question was entered first by one, Andrew H. Murray, which entry was relinquished; that Walter D. Storey, one of the appellees here, filed a homestead entry upon the land July 5, 1904, and this entry was cancelled by a relinquishment of Storey filed at 9:40 A. M. May 1, 1909 (Tr. p. 50).

Cannon himself says that he was with Storey in the land office when Storey relinquished this land, —they had gone to Billings together—Storey to relinquish and Cannon to file on this land (Tr. p. 64).

Story admits he held the land five years after Andrew Murray had an entry on it before relinquishing it; he told Cannon he, Storey, was going to relinquish (Tr. pp. 94-95).

Cannon worked for Storey from 1902 to 1905, and from 1907 until April, 1912, Cannon was training horses at Storey's place under an agreement (Tr. pp. 63-88); Cannon boarded at Storey's, paying $4.50 per week for his meals from 1907 until 1909 (according to one of his (Cannon's) versions) (Tr. pp. 63-64), but on page 60 of the transcript

Cannon admitted he boarded at Storey's paying $4.50 per week for the board; this latter statement by Cannon is corroborated by Storey's testimony (Tr. p. 88, lines 18-28), which is:

> "From May 1, 1909, until January 24, 1911, the only place I knew of Mr. Cannon boarding was at my place. He did not eat there all the time, but all the meals I knew of he took at my place. I don't know where he ate when he wasn't eating at my place. The arrangement between us with regard to his eating at my place was that he was to pay for his board and he paid his board. It was paid to me on our settlement, but I cannot fix the date of our settlements. We generally settled up once a year, or may be once in six months,"

and again Cannon admits he boarded one-fourth of the year 1909 after May 1 at Storey's (Tr. p. 67, l. 20-23).

The foregoing admissions on the part of the defendants are corroborative of the testimony of the plaintiff's witnesses who testified they never saw Cannon in the house or any signs of it being occupied by a human being from May 1, 1909, to January 24, 1911. Indeed, the descriptions show the house was unfit for human habitation.

See the testimony of the witness Imoff (Tr. p. 33, lines 27 et seq.) Imoff's testimony was that from March 1, 1909, until January, 1911, he was employed by the defendant Storey; that Storey's home was one and one-half miles from Cannon's homestead;

that Imoff herded sheep between Storey's land and Cannon's homestead, and from the first of May, 1909, until Imoff left in June he had Storey's sheep on the Cannon land, camping on the Cannon place about three or four hundred yards from Cannon's cabin; that Storey moved the sheep from Storey's place to Cannon's; Imoff had seen that cabin since 1908 when he first worked for Storey; that in 1908 and 1909 the door of the cabin was open, floor bad; cattle and horses had been in it; roof leaky, not fit to live in, is clear and convincing, although the trial judge seemed to think that Imoff's and the testimony of appellant's other witnesses was entirely reconcilable to that of the testimony introduced by appellees, and only showed a lack of physical presence but not a lack of continuous residence.

The testimony of Imoff and others shows ample opportunity on their part to observe the homestead with such frequent and close observations of the house, as disclosed by the testimony, it can hardly be said that a "continuous residence" was maintained by Cannon and the requirements of law, Section 2301, of the Revised Statutes, complied with. After Imoff left Storey's in June, 1909, he saw the place twice a week until after final proof, passing along a road that goes within twenty-five steps from west side of cabin, having to pass it in going to his town from where he then lived; he also saw Cannon at Storey's place several times from May 1 to June, 1909, and saw Cannon eat meals at Storey's (Tr. pp. 32-37).

The witness W. H. Harrison lived north of the Cannon homestead from May 1, 1909, until January 24, 1911, and passed over it on the road that went within twenty or twenty-five feet from the cabin twice a week during that period, both in the day and in the night time. Harrison never saw anyone at the cabin and never saw smoke or other signs of anyone living in the cabin, or tracks in the snow around the house. He saw Storey's teams plowing. When Cannon filed, the condition of the cabin was as Imoff had described it (Tr. pp. 37-41).

Miss Robin Harrison testified that from May 1, 1909, until January 24, 1911, she passed the house on Cannon's place, on the same road, twice a day as she went to and from school, which would be five days a week, and she never saw anyone living there, and only saw Cannon there once building a barn; that she looked into the cabin once and saw a table, stove, and bed but saw no groceries and saw the floor broken down in one place; from the general appearance of the place about the house or inside it appeared that no one had been living there; that school began in September each year and ended in May of the next (Tr. pp. 41-44). This testimony is corroborated by the witness Mrs. Harrison (Tr. pp. 54-55), and the witness Loeffer (Tr. pp. 55-56).

Mrs. Kirk testified that part of the time between May 1, 1909, and January 24, 1911, she and her husband lived near Story's house, that she cooked a great deal of the time at Storey's house and saw Cannon eating his meals every day there with

Storey whenever she was cooking, which was off and on between those dates; that Cannon stayed in the trotting barn of Storey's and kept his clothes there, had his bed there; she washed Cannon's clothes at Storey's, especially from March, 1910, to September, 1910, she went to the Storey house every day and every time she took her meals there she saw Cannon; that Mr. and Mrs. Storey called the room in the trotting barn "Cannon's room" and the witness saw Cannon's clothes in it. (Tr. pp. 45-49).

August Kirk testified that he went to work for Storey in the spring of 1909 and Cannon was breaking horses there and roomed in the trotting barn; that he, Kirk, planted crops on Storey's place under Storey's orders and Story paid for it; that Cannon ate his meals at Storey's with Storey and himself the first year Kirk was at Storey's; saw the homestead cabin once or twice a week during the winter of 1910 and 1911 and no one lived in it; that Cannon was away from Storey's with horses the summer of 1909 and again the summer of 1910 (Tr. pp. 50-53).

This testimony for plaintiff finds abundant corroboration in the testimony of the defense. Cannon himself says he found the house not in liveable order and put in a floor, a window and covered the roof (Tr. p. 57). He ate most of his meals at Storey's and paid Storey for them (Tr. pp. 59-60), which corroborates the Kirks; that he was absent fifty-two days from the homestead in the summer of 1910 (Tr. p. 60), but it is to be observed he swore in his final proof as admitted in the pleadings that he was

not absent except for two weeks in December, 1910 (Tr. pp. 8, 21).

The final proof witness Buster testified for appellees, says he helped Cannon fix up the place but his entire testimony is a maze of glittering generalities and not entitled to any credit. He says he saw Cannon on the homestead between May, 1909, and January, 1911, sometimes once a week and sometimes every day, but he never saw Cannon eat a single meal on the homestead (Tr. p. 76), which indeed is incredible if we are to believe him. Indeed, he states that the improvements not including the new barn which Cannon built were worth $1,000 (Tr. p. 79, lines 15-18), but in this connection remember the record shows the land and improvements were all sold in 1912 for $1000.

Chester A. Roberts, the other final proof witness, is a son in law of Mr. Storey's, hence is interested more or less in the litigation. He saw Cannon once in a while at the homestead, but Roberts was never in the cabin in the evening and did not know where Cannon slept; but knew he ate at Storey's sometimes (Tr. pp. 81-84); on cross examination he also testified the improvements were worth $1000 (Tr. p. 84); that the floor in the cabin was broken through in several places in 1910 (Tr. p. 85, lines 7-10)—this is evidence corroberating Mrs. Harrison (Tr. p. 42, line 24) he further states he supposed Cannon was residing on the homestead from May, 1909, to January, 1911 (Tr. p. 85, line 24-28), but he did not know it.

Walter D. Storey, one of the appellees, merely states that Cannon did not know that Harry Cannon slept in the bunk house or in the harness room on the Storey ranch while he had the homestead (Tr. p. 89, lines 1-18); that there was a bed in the harness room but Storey did not know of anyone using it from May, 1909, to January, 1911 (Tr. p. 89, lines 1-6), and Storey never saw Cannon on his homestead (Tr. p. 96, lines 15-21); indeed, we find Storey states:

> "During 1909 and 1910 when Mr. Cannon was at my place he ate there. I think that when he was working there, when he had his horses at the barn during 1909 and 1910, that he ate more frequently at my place than he did any place else. That is my belief. As a matter of fact I expect he ate nearly all of his meals at my place when he was training the horses at my barn during 1909 and 1910."

In view of the foregoing testimony, we respectfully submit it shows conclusively by appellant's proof, corroborated as it is throughout by appellees' proof, that Cannon never established a residence on the land in question, and the patent should be cancelled. The purchase of the land by Storey was certainly with full knowledge on his part that Cannon had not complied with the law as to residence, etc. Indeed, Storey was familiar with the land, had himself used it for five years under a homestead entry of his own prior to Cannon's filing without any attempt on his, (Storey's) part to live on the

land, and further what cultivation was done during Cannon's time was by Storey. Hence we submit that the rule laid down in the case of Cooper v. U. S., 220; Fed. 871-872, should apply here and Storey's purchase be held to be one not innocent and in good faith or for a valuable consideration.

For men like Storey cannot truthfully say that they know nothing of conditions when he did know Cannon, the land itself, having farmed and grazed part of it, and had Cannon paying board at Storey's place throughout the period involved.

We respectfully submit the decree of the trial court should be reversed and one cancelling the patent entered.

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